

THE HIGH COURT

[2022] IEHC 452

[Record 2021/5774P]

BETWEEN

NICOLA LIPINSKI (A MINOR)

(SUING BY HER MOTHER AND NEXT FRIEND MONIKA SZYSZKO)

PLAINTIFF

AND

MARTINA WHELAN

DEFENDANT

JUDGMENT of Mr. Justice Coffey delivered on the 1st day of July 2022

1. This is a personal injury case which has come before this Court for assessment of damages only. Special damages have been agreed in the sum of €1,200. At issue is the amount this Court should award by way of general damages for the plaintiff's pain and suffering to date and into the future.

2. The plaintiff is a minor who was born on the 7th of September 2005. She has just completed Transition Year and is about to embark on her final two years at school.

3. Her claim for damages arises from a road traffic accident which occurred on the morning of the 10th of December 2019 when the plaintiff was making her way to school at St. Wolstan's Abbey, Celbridge, County Kildare. It is admitted that as she crossed the road which led to the school, the plaintiff was suddenly and without

warning wrongfully hit by a car that was then being driven by the defendant as a result of which she was caused to fall forward on to the grass verge of an adjacent footpath.

4. It is not in dispute that the plaintiff developed a significant psychological reaction to the trauma of the accident which was subsequently diagnosed as Post Traumatic Stress Disorder ('PTSD'). It is further agreed that as a result of the collision and fall to the ground, the plaintiff also sustained multiple physical injuries of varying gravity, the most significant of which was an abrasion to the upper part of the back of her left thigh which has left her with a visible scar about which she remains sensitive and embarrassed. In addition, she sustained a miscellany of minor injuries all of which settled after a short period including a soft tissue injury to her back, a sprain to her left wrist, a contusion injury to her left ankle and an injury to her left shin which has left her with a minor and barely visible area of discolouration.

5. I do not propose to rehearse the evidence and submissions upon which the parties rely which are recorded on the transcript of the very brief hearing of this matter last Friday which is supplemented by a booklet of agreed medical reports.

6. It is common case that the Personal Injuries Guidelines which were adopted by the Judicial Council on the 6th of March 2021 apply to this case ('the Guidelines').

7. S.99 of the Judicial Council Act 2019 provides:

“(1) The court shall, in assessing damages in a personal injury action-

(a) have regard to the personal injury guidelines (within the meaning of s.2 of the Judicial Council Act 2019), and

(b) where it departs from those guidelines, state the reasons for such departure in giving its decision.”

8. The Guidelines were drawn up to reflect the principles and policies set out in s. 90 of the Judicial Council Act 2019 including the legal principles for the assessment and award of damages for personal injuries which have been determined and developed over time by the High Court, the Court of Appeal and the Supreme Court. It is clear from its introductory section that the Guidelines do not change but rather expressly seek to promote those principles with a view to achieving greater consistency in awards with due regard to the fact that cases will invariably have their own unique features.

9. Subject to a maximum of €550,000 for the most devastating and catastrophic of injuries, the Guidelines ‘propose’ different ranges of damages for different injuries depending on whether the characteristics of the relevant injury under consideration are such as to be classified as severe, serious, moderate or minor.

10. The Guidelines set out a procedure which the trial judge must have regard to before making an award. First, at the conclusion of the hearing of evidence, the trial judge is required to ask each party by reference to the evidence to identify what each party contends to be the plaintiff’s dominant injury, to further identify the damages bracket which each party contends most ‘closely matches’ the evidence relating to that injury and to further submit where the relevant injury falls on the relevant scale of damages. Secondly, having so engaged with the parties, the trial judge is further required to make his or her findings of fact concerning the plaintiff’s dominant injury following which he or she is required to consider how in the light of those findings and the submissions made, the Guidelines should ‘impact’ on the Court’s award.

11. When carrying out this task, the trial judge is not relieved of his or her duty to adhere to the legal principles which apply to the assessment and award of general damages for personal injuries. The Guidelines expressly require that those principles

should be ‘to the forefront’ of the mind of the trial judge when making his or her award. The Guidelines further expressly acknowledge that those principles require that awards of damages are just and fair to both parties whilst also being proportionate to the awards of damages commonly made in cases involving injuries of greater or lesser magnitude.

12. Where the trial judge considers that the ‘justice of the case’ warrants an award above the level of damages ‘proposed’ for the relevant or ‘a similar injury’, the Guidelines acknowledge that he or she may pursuant to s.99(1)(b) of the Act of 2019 depart from the Guidelines but must state his or her reasons for so doing. It is manifest that the reason given for departing from the Guidelines must not only be rational and cogent but also must be justifiable in the interests of justice such that any departure from the Guidelines must be in accordance with the well-established legal principles which apply to the assessment and award of general damages in personal injuries cases. This is to be inferred from the inherent design of the Guidelines whereunder the trial judge must always have to the forefront of his or her mind the legal principles which both underlie the Court’s jurisdiction and which the Guidelines expressly seek to promote.

13. Where the proviso applies, therefore, it not merely allows but requires the trial judge to depart from the Guidelines. This might arise, for example, where in the particular circumstances of the case under consideration, strict and inflexible adherence to the wording of the classification of injuries or the monetary bands of damages set out in the Guidelines would be in clear conflict with the overriding duty of the trial judge to at all times follow and apply the settled jurisprudence which applies to the assessment and award of general damages for personal injuries. It should be readily acknowledged, however, that such tension is unlikely to arise in

straightforward cases where the relevant injury does not have atypical features and readily falls into one or more of the relevant defined categories in the Guidelines.

14. The Guidelines further set out a procedure which the trial judge must have regard to when considering the effect of multiple injuries on the level of damages to be awarded to a plaintiff who has suffered more than one appreciable injury. In cases involving multiple injuries such as this, the trial judge is required by the Guidelines ‘where possible’ to identify the injury and bracket of damages that best corresponds to the most significant of the plaintiff’s injuries which he or she should then value and thereafter ‘uplift’ by an amount that ensures that the plaintiff is ‘fairly and justly compensated’ for all of the effects of the lesser injuries in order to arrive at an overall award that is ‘proportionate and just’. In arriving at that figure, the trial judge is required to have regard to the severity of other injuries which attract an equivalent award under the guidelines.

15. In this case, it is not in dispute that the plaintiff’s dominant injury was her psychological reaction to the trauma of the accident which both parties agree resulted in PTSD. It is further not in dispute that the PTSD was such that it affected the plaintiff acutely for a period of many months during which time she suffered from persistent nightmares, flashbacks, panic attacks, sleeplessness, irritability, low mood, withdrawal from her family, poor concentration, demotivation at school with a corresponding decline in academic achievement, fear of cars, fear of going out in the dark and recurring thoughts of self-harm which culminated in an act of self-cutting. It is further not in dispute that the plaintiff required and received counselling and that she will require more focused counselling in the future. It is clear from the expert evidence that the plaintiff’s PTSD has since abated to a point that she is now only mildly symptomatic and progressing towards recovery. She continues nonetheless to

have residual symptoms and complaints including a fear of cars, a fear of going out in the dark and poor performance at school.

16. It is common case that the characteristics of the PTSD under consideration in this case are not such as to be classifiable under the Guidelines as Severe or Minor PTSD. What is left is either Serious or Moderate PTSD. The Guidelines define Serious PTSD as being “a category (that is) distinct from (Severe PTSD) because of a prognosis projecting some recovery with professional help. However, the effects are still likely to cause significant disability for the foreseeable future”. A classification of Moderate PTSD will arise under the Guidelines where “the injured person will have largely recovered, and any continuing effects will not be grossly disabling”.

17. Mr Byrne SC for the plaintiff contends that the PTSD complained of by the plaintiff in these proceedings is such as to straddle the top end of the damages bracket for Moderate PTSD (€10,000-€35,000) and the bottom end of the damages bracket for Serious PTSD (€35,000-€80,000) which he submits would suggest a value between €40,000 and €50,000. Relying on the fact that its effects are such that the PTSD is unlikely to cause significant disability for the foreseeable future, Mr Mohan SC for the defendant contends that the PTSD cannot be classified under the Guidelines as Serious PTSD and submits that the disorder suffered by the plaintiff falls into the bottom end of the damages bracket for Moderate PTSD which he submits would suggest a value of in or about €20,000.

18. I find as a fact that the PTSD from which she continues to suffer significantly upended almost every aspect of the plaintiff’s life for a period of many months at a crucial and vulnerable time in her development. I further find as a fact that during this relatively short but important time the plaintiff’s PTSD was severely disabling until it began to settle with counselling and family support. I further accept that while the

plaintiff is no longer significantly disabled by it, the past effects of the PTSD continue to be potentially serious for the plaintiff into the future insofar as they have caused her to become demotivated at school where because of loss of study habits, she has gone from being an A/B student to being a D student as she heads into the final and most critical phase of her secondary school education.

19. In assessing the legal consequences of the possible risk of educational disadvantage, I must proceed with caution. While I accept that the plaintiff has suffered a decline in academic performance, there is no supporting or contextualising evidence from her teachers to suggest that her current academic decline is such that it is likely to continue or to become permanent or irreversible. The plaintiff also impressed me as a bright and able person who with further counselling and family support is more likely than not to reengage with her school work. The fact remains, however, that whether she reengages or not, she has already suffered educational disadvantage insofar as she has fallen behind in her school work. There remains, therefore, an appreciable risk that she may not catch up howsoever well motivated she may become over the next two years.

20. In *McKeown v Crosbie & Anor.* (Court of Appeal 11th of August 2020), Noonan J stated that the trial court must look at the objective medical evidence, in particular, to arrive at fair compensation in any given case. In this case the agreed expert evidence on this issue does not warrant a finding that the effects of the plaintiff's PTSD are likely to cause significant disability for the foreseeable future such that the injury is classifiable under the Guidelines as Serious PTSD. Applying the settled jurisprudence of the Superior Courts which applies to the assessment of general damages in personal injuries cases, I do not consider that I am required to classify the injury differently or to otherwise depart from the Guidelines in assessing

its value. I will therefore classify the PTSD as Moderate PTSD. To take account of its severity in the past and the fact that its past effects have caused educational disadvantage to the plaintiff to date which could adversely affect her performance in the Leaving Certificate Examination and beyond, I will place the plaintiff's PTSD at the very top of the applicable damages bracket for Moderate PTSD and will therefore assign to it a value of €35,000.

21. The plaintiff also sustained physical injuries the most significant of which was a superficial linear abrasion to her left thigh just below her buttock which has left her with a visible and permanent scar. Located at the upper part of the back of her left thigh, the plaintiff's scar is 12.5 cm long and 2 cm wide. Although it is permanent and cannot be improved by surgery, the scar has settled to the point that it is now white and pale without any contour defect. Having viewed it, I am satisfied that the scar is objectively in the nature of a relatively minor cosmetic deficit which is neither particularly disfiguring nor indeed particularly distinct. I must, however, bear in mind that subjectively for the plaintiff the scar is a significant disfigurement about which she feels particularly self-conscious to the extent that she always covers it up even in hot weather or when swimming. The plaintiff also sustained multiple soft tissue injuries of a relatively minor nature to her neck, back, left wrist and left ankle associated with bruising and tenderness together with a minor abrasion to her left shin which has left an area of minor discolouration which is now barely noticeable.

22. To arrive at an overall figure which is proportionate and just and which ensures that the plaintiff is fairly and justly compensated for all her injuries, I will apply a further uplift of €25,000 for the scar and the plaintiff's other physical injuries.

23. There will therefore be judgement for €61,200 being €60,000 for general damages and €1,200 for agreed special damages.